9.2.1 ADA Definitions — Disability

Model

Under the ADA, the term "disability" means a [physical/mental] impairment that "substantially limits" a "major life activity." I will now define some of these terms in more detail. Again, I remind you to consider the specific definitions I give you, and not to use your own opinions as to what these terms mean.

["Physical/Mental Impairment"

The term "physical impairment" means any condition that prevents the body from functioning normally. The term "mental impairment" means any condition that prevents the mind from functioning normally.]

[Major Life Activities

Under the ADA, the term "disability" includes a [physical/mental] impairment that substantially limits a major life activity. Major life activities are activities that are of central importance to everyday life. I instruct you that [describe activity] is a major life activity within the meaning of the ADA.]

["Substantially Limiting"

Under the ADA, an impairment "substantially limits" a person's ability to [describe relevant major life activity] if it prevents or restricts him from [relevant activity] compared to the average person in the general population.]

[If working is the relevant major life activity, add the following to the above paragraph:

In this case [plaintiff] claims that [he/she] is "substantially limited" in the ability to work. An impairment substantially limits [plaintiff's] ability to work if it significantly restricts [him/her] from performing a class of jobs, or a broad range of jobs in various classes, compared to someone with similar knowledge, skills, and training. Being unable to do [describe the particular job at issue], however, is not by itself a substantial limitation on the ability to work.**]**

To decide if plaintiff's [alleged] impairment substantially limits [plaintiff's] ability to [relevant activity], you should consider the nature of the impairment and how severe it is, how long it is expected to last, and its expected long-term impact. [You must also consider whether [plaintiff] can or does use any corrective measure or device [such as glasses, hearing aid, etc.]. If [plaintiff's] use of a corrective measure or device allows [him/her] to perform [describe major life activity] as well as a member of the general population, then [plaintiff] does not have a "disability" within the meaning of the ADA.]

Only impairments with a permanent or long-term impact are disabilities under the ADA. Temporary injuries and short-term impairments are not disabilities. [Even so, some disabilities are permanent, but only appear from time to time. For example, if a person has a mental or physical disease that usually is not a problem, but flares up from time to time, that can be a disability if it substantially limits a major life activity.]

The name of the impairment or condition is not determinative. What matters is the specific effect of an impairment or condition on the life of [plaintiff].

[For use when there is a jury question on whether plaintiff is "regarded as" disabled:

The ADA's definition of "disability" includes not only those persons who are actually disabled, but also those who are "regarded as"having a disability by their employer. The reason for this inclusion is to protect employees from being stereotyped by employers as being unable to perform certain activities when in fact they are able to do so. [Plaintiff] is "regarded as" disabled within the meaning of the ADA if [he/she] proves any of the following by a preponderance of the evidence: [*Instruct on any alternative supported by the evidence*]

1. [Plaintiff] had a physical or mental impairment that did not substantially limit [his/her] ability to perform [describe activity], but was treated by [defendant] as having an impairment that did so limit [his/her] ability to perform the activity; or

2. [Plaintiff] had an impairment that was substantially limiting in [his/her] ability to perform [describe activity] only because of the attitudes of others toward the impairment; or

3. [Plaintiff] did not have any impairment, but [defendant] treated [him/her] as having an impairment that substantially limited [plaintiff's] ability to perform [describe

activity].**]**

[For use when there is a jury question on whether plaintiff has a record of disability:

The ADA definition of "disability" includes not only those persons who persons who are actually disabled, but also those who have a "a record of disability." [Plaintiff] has a "record of disablity" if [he/she] proves by a preponderance of the evidence that he has a record of a "physical or mental impairment" that "substantially limited" [his/her] ability to perform a [describe activity], as I have defined those terms for you. [This means that if [plaintiff] had a disability within the meaning of the ADA [but has now recovered] [but that disability is in remission], [he/she] still fits within the statutory definition because [he/she] has a record of disability.**]**

Comment

The ADA definition of "disability" is complex for a number of reasons: 1) there are three separate types of disability: "actual", "regarded as", and "record of" disability; 2) the basic definition of "disability" encompasses three separate subdefinitions, for "impairment", "substantially limited" and "major life activity", with a further definition necessary if working is the major life activity at issue; 3) perhaps most important, the technical definition of "disability" is likely to be different from the term as it is used in the vernacular by most jurors. In most cases, however, the instruction can be streamlined because not every aspect of the definition will be disputed in the case. For example, ordinarily there will be no jury question on whether what the plaintiff suffers from is an impairment.

"Impairment"

In *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998), the Court determined that an employee with HIV had a physical "impairment" within the meaning of the ADA. The

Court noted that the pertinent regulations interpreting the term "impairment" provide as follows:

> (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
>
> (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 CFR § 84.3(j)(2)(i) (1997).

The *Bragdon* Court noted that in issuing these regulations, "HEW decided against including a list of disorders constituting physical or mental impairments, out of concern that any specific enumeration might not be comprehensive." The Court relied on the commentary accompanying the regulations, which "contains a representative list of disorders and conditions constituting physical impairments, including such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism." After reviewing these sources, the Court concluded that HIV did constitute an impairment within the meaning of the ADA.

"Substantially Limits"

The Supreme Court has held that for impairment to "substantially limit" a major life activity, it must "significantly restrict" the plaintiff as compared to the general population. The Court in *Albertson's Inc., v. Kirkingburg,* 527 U.S. 555, 565 (1999), reversed a lower court's finding of a disability because the lower court "appeared willing to settle for a mere difference" between the plaintiff's performance and that of the general population. The Court concluded as follows:

> By transforming "significant restriction" into "difference," the court undercut the fundamental statutory requirement that only impairments causing "substantial limitations" in individuals' ability to perform major life activities constitute disabilities. While the Act "addresses substantial limitations on major life activities, not utter inabilities," *Bragdon* v. *Abbott*, 524 U.S. 624, 641 (1998), it concerns itself only with limitations that are in fact substantial.

See also *Kelly v. Drexel University*, 94 F.3d 102, 104 (3d Cir. 1996) (finding that a man who limped as a result of a hip injury, could not walk more than a mile, and had to climb stairs slowly was not disabled because he was not "substantially limited" in walking; while walking is a major life activity, "comparatively moderate restrictions on the ability to walk are not disabilities").

The Court in *Toyota Motor Mfg v. Williams,* 534 U.S. 184, 198 (2002), emphasized that the question of "substantial limitation" required an individualized assessment of the effect of the plaintiff's impairment. It held that to fall within the definition of "substantially limited" the plaintiff "must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term." The Court elaborated as follows:

> It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those claiming the Act's protection to prove a disability by offering evidence that the extent of the limitation caused by their impairment in terms of their own experience is substantial. *Albertson's, Inc.* v. *Kirkingburg, supra,* at 567 (holding that monocular vision is not invariably a disability, but must be analyzed on an individual basis, taking into account the individual's ability to compensate for the impairment). That the Act defines "disability" "with respect to an individual," 42 U.S.C. § 12102(2), makes clear that Congress intended the existence of a disability to be determined in such a case-by-case manner. [citations omitted] An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person. Carpal tunnel syndrome, one of respondent's impairments, is just such a condition.

The *Toyota* Court further held that a "substantial limitation" is not job-dependent:

> When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job.

For Third Circuit cases applying the "substantial limitation" requirement, *see, e.g., Taylor v. Pathmark Stores, Inc.,* 177 F.3d 180, 185 (3d Cir. 1999), where the plaintiff stated that because of a physical impairment he could only stand for 50 minutes at a time. The court held that while standing is a major life activity, the plaintiff did not suffer a

substantial limitation as compared to the general population:

> That he can only stand for half as long as the average Pathmark employee, or average person, is not necessarily proof that he is substantially impaired in his ability to stand. The relevant question is whether the difference between his ability and that of an average person is qualitatively significant enough to constitute a disability. Because Taylor can stand and walk for fifty minutes at a time, and can continue for longer periods if he takes a break every hour, he can carry out most regular activities that require standing and walking, even though he may not be able to perform Pathmark's jobs without accommodation. We conclude that his ability to walk and stand is not significantly less than that of an average person.

See also Taylor v. Phoenixville School Dist., 184 F.3d 296, 305 (3d Cir. 1999) (noting that "while substantial limitations should be considerable, they also should not be equated with 'utter inabilities'" and that relevant factors include "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." (quoting 29 C.F.R. § 1630.2(j)(2)").

Use of Corrective Devices

In *Sutton v. United Air Lines,* 527 U.S. 471, 482 (1999), the Court held that the existence of a "disability" under the ADA must be determined in light of corrective measures used by the employee—in that case, the use of eyeglasses to correct severely impaired vision. The Court declared that "it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effect of those measures– both positive and negative— must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." The instruction contains a bracketed option to be used when the effect of the plaintiff's use of corrective devices or measures is in dispute.

"Major Life Activity"

The question of whether the plaintiff is substantially limited in performing a "major life activity" is a question for the jury. *Williams v. Philadelphia Housing Auth. Police Dept*., 380 F.3d 751, 7633d Cir. 2004) ("The question of whether an individual is substantially limited in a major life activity is a question of fact."). But whether a certain activity rises to the level of a "major life activity" is usually treated as a legal question.

For example, in *Bragdon v. Abbott,* 524 U.S. 624, 637 (1998), the Court held as a matter of law that reproduction is a major life activity within the meaning of the ADA. *See also Toyota Motor Mfg, Inc., v. Williams,* 534 U.S. 184 (2002) (doing manual tasks is a major life activity). Similarly the Third Circuit has held that a number of activities constitute major life activities. *See, e.g., Gagliardo v. Connaught Laboratories, Inc.,* 311 F.3d 565, 573 (3d Cir. 2002) (concentrating and remembering are major life activities); *Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 305 (3d Cir. 1999) (holding that thinking is a major life activity, as it is "inescapably central to anyone's life"). *See also Peter v. Lincoln Technical Institute,* 225 F.Supp.2d 417, 432 (E.D.Pa. 2002) (noting the dispute in the courts on whether talking and interacting with others is a major life activity: "Although talking and interacting with others has not expressly been determined by this Circuit to be a major life activity, this Circuit, consistent with EEOC guidelines, is generally unwilling to take a narrow view of what consitutes a major life activity. See *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306-310 (3d Cir. 1999)"). Accordingly, the instruction does not leave to the jury the determination of whether the plaintiff's claimed impairment is one that affects a major life activity. Rather, the jury must decide whether the plaintiff is substantially limited in performing the major life activity found to be at issue by the court.

An activity need not be related to employment to constitute a "major life activity." Thus in *Bragdon v. Abbott,* 524 U.S. 624, 637 (1998), the Court held that reproduction was a "major life activity" within the meaning of the ADA (and the Rehabilitation Act). The employer argued that Congress intended the ADA only to cover those aspects of a person's life that have a public, economic, or daily character. But the Court declared that nothing in the ADA's statutory definition "suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word 'major.'" It noted that the pertinent regulations include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 CFR § 84.3(j)(2)(ii) (1997); 28 CFR § 41.31(b)(2) (1997). The *Bragdon* Court stated that the "inclusion of activities such as caring for one's self and performing manual tasks belies the suggestion that a task must have a public or economic character in order to be a major life activity for purposes of the ADA. On the contrary, the . . . regulations support the inclusion of reproduction as a major life activity, since reproduction could not be regarded as any less important than working and learning."

Work as a Major Life Activity

The Supreme Court has expressed unease with the concept of working as a major life activity under the ADA. In *Sutton v. United Air Lines,* 527 U.S. 471, 492 (1999), the Court noted that "there may be some conceptual difficulty in defining 'major life

activities' to include work, for it seems to argue in a circle to say that if one is excluded, for instance, by reason of an impairment, from working with others then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap." (Citing Transcript of Oral Argument of Solicitor General in *School Bd. of Nassau Co. v. Arline*, 481 U.S. 1024, O. T. 1986, p. 15). The *Sutton* Court assumed without deciding that working was a major life activity. It declared, however, that if the major life activity at issue is working, then the plaintiff would have to show an inability to work in a "broad range of jobs," rather than a specific job.

The court in *Peter v. Lincoln Technical Institute*, 225 F.Supp.2d 417, 432 (E.D.Pa. 2002): describes the Third Circuit's two-step process when the plaintiff claims a substantial limitation in the major life activity of working:

> The Third Circuit follows the two-step analysis recommended by the EEOC's interpretive guidelines for determining whether a plaintiff is substantially limited in her ability to perform a major life activity. See *Mondzelewski v. Pathmark Stores, Inc*., 162 F.3d 778, 783 (citing 29 C.F.R. Pt. 1630, App. § 1630.2(j)). A court must first determine whether the plaintiff is significantly limited in a life activity other than working. *Mondzelewski,* 162 F.3d at 783. Only if the court finds that this is not the case should it move to considering whether plaintiff is substantially limited in the major life activity of working.

"Regarded as" Disabled

The rationale behind "regarded as" disability was described by the Third Circuit in *Deane v. Pocono Medical Center,* 142 F.3d 138, 143 n.5 (3d Cir. 1998) (en banc):

> With the "regarded as" prong, Congress chose to extend the protections of the ADA to individuals who have no actual disability. The primary motivation for the inclusion of misperceptions of disabilities in the statutory definition was that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment.

The *Deane* court emphasized that the plaintiff does not need to show that the employer acted with bad intent in regarding the plaintiff as disabled:

> Although the legislative history indicates that Congress was concerned about eliminating society's myths, fears, stereotypes, and prejudices with respect to the disabled, the EEOC's Regulations and Interpretive Guidance make clear that even an innocent misperception based on nothing more than a simple mistake of fact as

> to the severity, or even the very existence, of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability. See 29 C.F.R. pt. 1630, app. § 1630.2(l) (describing, as one example of a "regarded as" disabled employee, an individual with controlled high blood pressure that is not substantially limiting, who nonetheless is reassigned to less strenuous work because of the employer's unsubstantiated fear that the employee will suffer a heart attack). Thus, whether or not PMC was motivated by myth, fear or prejudice is not determinative of Deane's "regarded as" claim.

142 F.3d at 144. Nor is "regarded as" disability dependent on plaintiff having any impairment. The question is not the plaintiff's actual condition, but whatever condition was perceived by the employer. *See Kelly v. Drexel University,* 94 F.3d 102, 108 (3d Cir. 1996) ("Our analysis of this ["regarded as"] claim focuses not on Kelly and his actual abilities but on the reactions and perceptions of the persons interacting or working with him.").

The mere fact that the employer offered an accommodation does not mean that the employee was "regarded as" disabled. *Williams v. Philadelphia Housing Auth*., 380 F.3d 751, 773 n.20 (3d Cir. 2004):

> Williams argues, inter alia, that PHA "admitted" he was disabled within the meaning of the ADA by offering him the opportunity to take an unpaid leave of absence, thereby "accommodating" him. We agree with the Sixth and Ninth Circuits, however, that an offer of accommodation does not, by itself, establish that an employer "regarded" an employee as disabled. See *Thornton v. McClatchy Newspapers, Inc*., 261 F.3d 789, 798 (9th Cir. 2001) ("When an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled. A contrary rule would discourage the amicable resolution of numerous employment disputes and needlessly force parties into expensive and time-consuming litigation."), clarified in other respects, 292 F.3d 1045 (9th Cir. 2002); *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) ("The intent behind this ["regarded as"] provision, according to the EEOC, is to reach those cases in which 'myths, fears and stereotypes' affect the employer's treatment of an individual. [An employee] cannot show that this provision applies to him merely by pointing to that portion of the record in which his [employer] admitted that he was aware of [the employee's] medical restrictions and modified [the employee's] responsibilities based on them.").

The *Williams* court stated that "in general, an employer's perception that an employee cannot perform a wide range or class of jobs suffices to make out a 'regarded as' claim" and that, with respect to a "regarded as" claim, the employer "would be liable if it

wrongly regarded the employee as so disabled that he could not work and therefore denied him a job."

Reasonable Accommodation Requirement as Applied to "Regarded as" Disability

In *Williams v. Philadelphia Housing Auth*., 380 F.3d 751, 770 (3d Cir. 2004), the employer argued that it had no obligation to provide a reasonable accommodation to an employee it "regarded as" disabled because there was no job available that would accommodate the perceived disability—that is, the defendant regarded the employee as completely unable to do any job at all. The court described the employer's argument, and rejected it, in the following passage:

> To the extent Williams relies upon a "regarded as" theory of disability, PHA contends that a plaintiff in Williams's position must show that there were vacant, funded positions whose essential functions the employee was capable of performing *in the eyes of the employer who misperceived the employee's limitations*. Even if a trier of fact concludes that PHA wrongly perceived Williams's limitations to be so severe as to prevent him from performing any law enforcement job, the "regarded as" claim must, in PHA's view, fail because Williams has been unable to demonstrate the existence of a vacant, funded position at PHA whose functions he was capable of performing in light of its misperception. . . . PHA's argument, if accepted, would make "regarded as" protection meaningless. An employer could simply regard an employee as incapable of performing any work, and an employee's "regarded as" failure to accommodate claim would always fail, under PHA's theory, because the employee would never be able to demonstrate the existence of any vacant, funded positions he or she was capable of performing in the eyes of the employer. . . . Thus, contrary to PHA's suggestion, a "regarded as" disabled employee need not demonstrate during litigation the availability of a position he or she was capable of performing in the eyes of the misperceiving employer. . . .

The employer in *Williams* made an alternative argument: that if an employee is "regarded as" but not actually disabled, the employer should have no duty to provide a reasonable accommodation because there is nothing to accommodate. In *Williams*, the plaintiff was a police officer and the employer regarded him as being unable to be around firearms because of a mental impairment. The court analyzed the defendant's argument that it had no duty to provide an accommodation to an employee "regarded as" disabled, and rejected it, in the following passage:

> PHA . . . suggests that Williams, by being "regarded as" disabled by PHA, receives a "windfall" accommodation compared to a similarly situated employee who had not been "regarded as" disabled and would not be entitled under the ADA to any accommodation. The record in this case demonstrates that, absent PHA's erroneous perception that Williams could not be around firearms because of his mental impairment, a radio room assignment would have been made available to him and others similarly situated. PHA refused to provide that assignment solely based upon its erroneous perception that Williams's mental impairment prevented him not only from carrying a gun, but being around others with, or having access to, guns - perceptions specifically contradicted by PHA's own psychologist. While a similarly situated employee who was not perceived to have this additional limitation would have been allowed a radio room assignment, Williams was specifically denied such an assignment because of the erroneous perception of his disability. The employee whose limitations are perceived accurately gets to work, while Williams is sent home unpaid. This is precisely the type of discrimination the "regarded as" prong literally protects from . . . . Accordingly, Williams, to the extent PHA regarded him as disabled, was entitled to reasonable accommodation

Thus, an employee “regarded as” having a disability is entitled to the same accommodation that he would receive were he actually disabled.